BLEED THROUGH

UNITED STATES of America

v.

Ray COWAN and Jake Jacobsen.

Crim. A. No. CR-6-74-3.

United States District Court,
N. D. Texas,
San Angelo Division.

Sept. 6, 1974.

MEMORANDUM OPINION AND ORDER OVERRULING MOTION TO DISMISS

ROBERT M. HILL, District Judge.

The United States Attorney on August 29, 1974, filed and presented to this court a motion to dismiss the indictment in this case against the defendant Jake Jacobsen. The court has fully considered the motion and the government's support memorandum and is of the opinion that the motion should be denied.

On February 6, 1974, a federal grand jury returned a seven count indictment in the United States District Court for the Northern District of Texas, San Angelo Division, against Jake Jacobsen and Ray Cowan. In counts one through six of the indictment Jacobsen and Cowan were charged with conspiracy, embezzlement, and unlawfully defrauding the sum of $825,000 from a federally insured savings and loan association located

in San Angelo, Texas. In count seven of the indictment Jacobsen alone was charged with making false declarations before the federal grand jury that returned the indictment. The maximum penalty on a guilty verdict on counts one through six is a fine of $60,000 and imprisonment for 30 years. The maximum penalty on a guilty verdict on count seven is a fine of $10,000 and imprisonment for 5 years. Although prosecution of the San Angelo case was initiated by the United States Attorney for the Northern District of Texas, who signed the indictment along with the foreman of the grand jury, this prosecution apparently is now being handled by the Department of Justice.[1]

According to the government's motion, a federal grand jury on July 29, 1974, in the District of Columbia returned an indictment in the United States District Court charging Jacobsen with bribing a public official in violation of 18 U.S.C. § 201(f) and also charging Jacobsen as an unindicted co-conspirator under the conspiracy statute, 18 U.S.C. § 371. This bribery charge carries a maximum penalty of a fine of $10,000 and imprisonment for 2 years. Again, according to the government's motion to dismiss in this case, the prosecution of the Washington indictment is being handled by the Office of the Watergate Special Prosecutor.

However, over two months before the return of the Wash-

[1] This change was first made known to this court in the motion to dismiss. Paragraph one of the motion states that the case is being "handled by the Department of Justice." This court accepts this statement as true although the government's motion is signed and was presented and orally argued in open court by the Honorable Frank D. McCowan, United States Attorney for the Northern District of Texas; and a member of his staff. Up to this time no one in the Department of Justice has signed any pleadings or made any appearance in this court in connection with the prosecution of this cause.

BLEED THROUGH

ington indictment, on May 21, 1974, the Office of the Watergate Special Prosecutor finalized a purported "plea bargain" with the defendant Jacobsen wherein the United States agreed to accept a guilty plea from Jacobsen to a one count charge of bribing a public official in violation of 18 U.S.C. § 201(f). The "plea bargain" also purported to "dispose of potential charges based on matters presently known to this office" (out of which the Washington indictment was later returned on July 29, 1974) and also to dispose of all of the charges against Jacobsen contained in the San Angelo indictment. In addition to agreeing to plead guilty in the District of Columbia to the bribery charges, Jacobsen agreed, *inter alia*, to make "full and truthful disclosure" of all revelant information and documents in his possession and to testify in court regarding matters where he possessed relevant information. The agreement did not bar future prosecution of Jacobsen for perjury or "serious offenses" of which the Watergate Prosecutor was unaware.[2]

According to the government's motion, on August 7, 1974, Jacobsen entered a plea of guilty to the Washington indictment

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[2] This purported plea bargain is set out in a letter from Henry S. Ruth, Jr., Deputy Special Prosecutor, Watergate Special Prosecution Force, United States Department of Justice, to Charles McNelis, Attorney, May 21, 1974. Before the date of this letter this court had considered and heard oral arguments on several motions filed in this case by the defendants. At the time this letter was written this case was set for trial on July 8. However, the government filed a motion for continuance alleging that an essential witness had suffered a heart attack and was unavailable to testify. The government furnished the court with a statement from the witness's physician certifying to his ill health, and based on such information the court continued this case and reset it for trial on September 23, 1974. The court again rescheduled its docket to accommodate the trial of this case in San Angelo on September 23, and it was not until the government's motion to dismiss was filed on August 29 that this court officially became aware that the government desired to dismiss the case as to Jacobsen.

and the plea was accepted by the Honorable George L. Hart, Jr., United States District Judge, for the District of Columbia. Thereafter the motion to dismiss this case as to Jacobsen was filed on August 29, 1974.[3] When the motion to dismiss was presented, this court inquired of the United States Attorney if the government desired to offer any evidence or make any statement. The United States Attorney offered no evidence and only stated that the government would rely on the motion, the plea bargain agreement attached thereto, and the memorandum of authorities.

Rule 48(a) of the Federal Rules of Criminal Procedure provides for the dismissal of an indictment by the attorney for the government:

> (a) *By Attorney for Government*: The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

The government argues in its memorandum that if a motion to dismiss an indictment duly returned and signed by the foreman of the grand jury and the United States Attorney is presented by the Attorney General or United States Attorney, then the court has no discretion except to grant the motion and dismiss the charges unless prejudice would result to the defendant.

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[3] On the same day the motion to dismiss was filed and presented to this court, the defendant Ray Cowan entered a plea of guilty to counts three and six of the indictment. This court has determined that there was a factual basis to support Cowan's plea of guilt and he has been adjudged guilty of the charges contained in counts three and six. The maximum penalty that this court could impose on these two counts is a fine of $20,000 and 10 years imprisonment.

BLEED THROUGH

Rule 48(a) specifically permits the dismissal of an indictment before trial "by leave of court." The issue before this court is the interpretation to be placed on the first sentence of rule 48(a). In determining this issue this court feels that it is necessary to examine both the law as it prevailed before the rule was enacted and the interpretations placed by the courts on the rule following its enactment.

At common law the rule prevailed in the federal courts that the United States Attorney or Attorney General had absolute control over criminal prosecutions and could dismiss or refuse to prosecute at his discretion, notwithstanding disapproval of a court. Confiscation Cases, 74 U.S. (7 Wall.) 454, 19 L.Ed. 196 (1868); United States v. Woody, 2 F.2d 262 (D.Mont. 1924). *Contra,* United States v. Krakowitz, 52 F.Supp. 774, 784 (S.D.Ohio 1943). In *Woody* the defendant was charged with embezzlement and the reasons advanced by the United States attorney for dismissing the indictment were that the defendant had not been apprehended, that he was of a prominent pioneer family, was young, had divorced and remarried his wife, was studying law and that his career as a lawyer would be spoiled, that the government's losses had been reimbursed. and that the attorney general had sanctioned the dismissal. 2 F.2d at 262. Under the then prevailing rule, a court was powerless to prevent the dismissal because no leave of court was necessary. In *Woody* Judge Bourquin recognized the then prevailing rule that the district attorney had control over criminal prosecution, but in expressing doubt over the government's reasons advanced for the dismissal of the indictment he observed:

> They [the reasons for dismissal] savor altogether too

> much of some variety of prestige and influence (family, friends, or money) that too often enables their possessors to violate the laws with impunity; whereas persons lacking them must suffer all the penalities. In brief, they and their like incite, if they do not justify, the too common reproach that criminal law is for none but the poor, friendless, and uninfluential; that in proportion to numbers the former are prosecuted, convicted, and punished in less degree than the latter, and their offenses are ignored, condoned, or pardoned in greater degree.
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> Than this belief in disparity in treatment of offenders, there is little that is more harmful to society, government, courts, law, and order; and in so far as it is well founded, the basis of it is a pernicious evil, and abhorrent to justice. 2 F.2d at 262.

It was during the existence of this entrenched common law rule that rule 48(a) was spawned. The government urges that rule 48(a) did not change the common law rule other than to give the courts discretion to refuse to dismiss a criminal prosecution in those cases where a dismissal would harass or prejudice the rights of a defendant. This court agrees with the government that if this case is dismissed the defendant Jacobsen is not being harassed or prejudiced, but this court does not agree that its function under rule 48(a) is limited to prevention of harassment or prejudice. This court is of the opinion that the discretion vested in a court by rule 48(a) is not so limited and that a court has a duty to determine on a motion of the government whether in the interest of justice the case should be dismissed.

The Advisory Committee on Criminal Rules recommended to the Supreme Court a rule that would permit prosecuting attorneys to file a dismissal of an indictment with a statement of the reasons therefore and providing that the prosecution

BLEED THROUGH

would then terminate. The Supreme Court rejected this proposal and added the requirement in the first sentence of rule 48(a) that only by leave of court could the prosecution file a dismissal. 8A J. Moore, Federal Practice ¶ 48.02 [1] (2d ed. 1973); L. Orfield, 6 Criminal Procedure Under the Federal Rules, §§ 48:18-19, at 339-43 (1967); C. Wright, Federal Practice & Procedure § 812, at 304 (1969). For a history of the drafting of rule 48(a), preliminary drafts and comments thereon refer to L. Orfield, 6 Criminal Procedure Under the Federal Rules, §§ 48:17, 18.

That the first sentence of rule 48(a) vests in the district judge broad discretion in dismissing an indictment is evidenced by the Notes of the Adivsory Committee on rule 48(a).[4] The Notes cite United States v. Woody, *supra*, as stating the common law rule which the first sentence of rule 48(a) changed. The Advisory Committee Notes indicate that rule 48(a), however, would have provided Judge Bourquin in ***Woody*** with the discretion to prevent the dismissal of the indictment. Fed.R.Crim.P. 48(a), Notes of Advisory Committee on Rules. Unless the first sentence of rule 48(a) gives a district judge a broader range of discretion than the protection of a defendant, the result reached in *Woody* would be the same under the present rule. In *Woody* no exercise of discretion was necessary for the protection of the defendant as the prosecutor sought not to harass but rather

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[4] The prominent text writers whose works on rule 48(a) have been reviewed by this court implicitly or expressly conclude that a court is not limited in the exercise of its discretion solely to the protection of defendants in ruling on a motion to dismiss an indictment. *See* 8A J. Moore, Federal Practice, ¶ 48.01 et seq. (2d ed. 1973); L. Orfield, 6 Criminal Procedure Under the Federal Rules, Rule 48, at 321-71 (1967); 3 C. Wright, Federal Practice & Procedure § 812, at 304 (1969).

to let the defendant "off the hook" because of who he was.[5]

The question of whether rule 48(a) is solely for the protection of the defendant or whether it reserves additional power to the district judge to determine whether to enter a dismissal has not previously been directly presented in the fifth circuit. United States v. Cox, 342 F.2d 167, 183 n.6 (5th Cir.), (en banc) (Brown, C. J., concurring) cert. denied, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965). However this circuit peripherally considered the scope and purpose of rule 48(a) by dicta in *Cox*.

In *Cox* the Honorable W. H. Cox, a United States District Judge, ordered the United States Attorney to prepare and sign an indictment requested by the federal grand jury. However, the United States Attorney received instructions from the then acting Attorney General not to sign the indictment. Judge Cox again ordered the United States Attorney to sign the indictment. Upon his refusal in open court Judge Cox held the United States Attorney in contempt. The government appealed the contempt order. The narrow holding of the majority in *Cox* is that under Fed.R.Crim. P. 7[6] a judge cannot require a United States Attorney to prepare and sign an indictment and if the United States Attorney refuses to sign an indictment there is no valid indictment. 342 F.2d at 171, 172. In *Cox* the majority stated that the purpose of rule 48(a) is to "prevent harass-

[5] No intimation is intended that such was the government's motivation in seeking a dismissal of the indictment in the case *sub judice*. The government's reasons for requesting a dismissal are treated in a separate part of this opinion.

[6] Federal Rule of Criminal Procedure 7 in pertinent part provides:

. . . (c) Nature and contents

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government . . . Fed.R.Crim.P. 7.

BLEED THROUGH

ment of a defendant by charging, dismissing and recharging without placing a defendant in jeopardy." *Id.* at 171, *citing* Woodring v. United States, 311 F.3d 417 (8th Cir. 1963). However, *Woodring* involved the application of the *second* sentence of rule 48(a), which requires the consent of a defendant if a dismissal is filed during a trial. This court recognizes that the second sentence of the rule gives the court discretion exercisable for the protection of a defendant. The case *sub judice*, however, involves the *first* sentence of rule 48(a) which does not require the consent of the defendant for dismissal but requires *leave of court*. This court feels that the holding of the majority in *Cox* regarding the authority granted to a court under the first sentence of rule 48(a) is clearly dicta and further misrelies on the holding of *Woodring* which construes only the second sentence of the rule.

Other courts have construed rule 48(a). In Nesbitt v. United States, 249 F.2d 17 (6th Cir. 1957) the sixth circuit recognized that rule 48(a) delegates some discretion to the district judge in addition to discretion exercisable for the protection of a defendant. In *Nesbitt* the defendant was charged in an information with violations of the narcotics laws. On motion of the government the trial court permitted dismissal of the information and the defendant appealed from that order. In a per curiam opinion the sixth circuit stated ". . . we find that the action of the district court was an entirely proper exercise of the discretion implicitly delegated by Rule 48 of the Federal Rules of Criminal Procedure . . ." *Id.*

In United States v. Doe, 101 F.Supp. 609 (D.Conn.1951) Judge Hincks stated his notions of the principles that control a judge with respect to the discharge of his responsibility in

making rulings under rule 48(a). In *Doe* the United States Attorney recommended dismissal of the entire case against a defendant whose case was pending on a plea of not guilty. Judge Hincks was of the opinion that in the exercise of sound discretion he could not dismiss an entire case against a defendant unless satisfied that the government lacked sufficient evidence to warrant a prosecution. *Id.* at 611, 612; *accord*, United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F.Supp. 483, 486 (S.D.N.Y.1964). *But see* United States v. Shanahan, 168 F.Supp. 225, 229 (S.D.Ind.1959) (court did not agree that the *only* justification for a dismissal is lack of sufficient evidence).

Judge Hincks observed in *Doe, supra,* that if the court has discretion in rule 48(a) matters it surely was entitled to factual information upon which the government recommendation is based. 101 F.Supp. at 611. He further observed that in the exercise of sound discretion the ruling judge must determine that a dismissal is compatible with the public interest.

Other district courts have stated that the bare assertion by the United States Attorney that the motion is made in the interest of justice" when not implemented by explanatory facts is not sufficient to justify a court in permitting the dismissal of an indictment. United States v. Becker, 221 F.Supp. 950, 953 (W.D.Mo.1963); United States v. Shanahan, 168 F.Supp. 225, 229 (S.D.Ind.1959). The government must present the factual basis which justifies the dismissal so that the judge can exercise the sound judicial discretion with which he is charged under rule 48(a). As aptly stated by a district judge in Massachusetts in denying a motion to dismiss:

BLEED THROUGH

> [The] District Court in passing on a motion by the Government to dismiss is not a mere rubber stamp and must exercise independent discretion . . . . United States v. Bettinger Corp., 54 F.R.D. 40, 41 (D.Mass. 1971).

Judge Weinfeld of the Southern District of New York outlined the standard to be applied in ruling on a government motion to dismiss under rule 48(a):

> The Rule contemplates public exposure of the reasons for the abandonment of an indictment . . . in order to prevent abuse of the uncontrolled power of dismissal previously enjoyed by prosecutors. Accordingly, to gain the Court's favorable discretion, it should be satisfied that the reasons advanced for the proposed dismissal are substantial and the real grounds upon which the application is based. United States of America v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F.Supp. 483, 486-487 (S.D.N.Y. 1964).

Professor Moore observes with reference to rule 48(a):

> Rule 48(a) provides no criteria, not even the most general, for the exercise of judicial discretion in ruling on a motion to dismiss. Nor does the rule require the prosecutor to state his reasons for seeking a dismissal, though it is difficult to understand how a court can rule on the application without such a statement. 8A J. Moore, Federal Practice ¶ 48.02(2) (2d ed. 1973).

As possible reasons for dismissal of a prosecution Professor Moore suggests (1) insufficiency of proof; (2) death of a defendant; (3) incurable insanity or incompetency to stand trial; (4) serious and incurable physical disease or disability; (5) defendant a fugitive; (6) protection of government security against possible trial disclosures; (7) and the superseding of an indictment. *Id.*

In the government's memorandum of law in support of its

motion to dismiss the indictment against defendant Jacobsen the government quotes from *Cox:*

> Although as a member of the bar, the Attorney for the United States is an officer of the court, he is nevertheless, an executive official of the government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of discretionary powers of the attorneys of the United States in their control over criminal prosecutions. Memorandum of Government at 2, quoting 342 F.2d at 171.

The discretionary power referred to in the above quotation is the discretionary power to sign or refuse to sign an indictment[7] and not the discretionary power to dismiss a prosecution once that prosecution has been set in motion by a valid indictment, i. e. signed by the United States Attorney. This court does not question the United States Attorney's unrestricted discretion to sign or not sign an indictment. The case *sub judice* however is not such a case. Here the prosecution was initiated by an indictment bearing the signatures of the grand jury's foreman and the United States Attorney. As Judge Brown aptly stated in his specially concurring opinion in Cox:

> With it [a properly signed indictment] the whole prosecution has been started. And what was previosly an unfet-

[7] A continuation of the paragraph quoted by the government makes it abundantly clear that the "discretionay power" under consideration was the power under rule 7 to sign or not sign an indictment.

> . . . The provision of Rule 7 requiring the signature of the indictment by the attorney for the Government, is a recognition of the power of Government counsel to permit or not to permit the bringing of an indictment. If the attorney refused to sign, as he has the discretionary power of doing, we conclude that there is no valid indictment. 342F.2d at 171.

BLEED THROUGH

> tered discretionary right on the part of the executive not to initiate prosecution has now been set in motion and can be stopped only on the executive taking with all the uncertainties which F.R.Crim.P. 48(a) generates. 342 F.2d at 183 (Brown, C. J., specially concurring).[8]

This case presents this court with the task of resolving those uncertainties. In so doing this court must conclude that if under rule 48(a) the government still has an absolute right to dismiss except where dismissal would be unfair to the defendant, the innovation in the Rules of Criminal Procedure requiring an order of court before an indictment could be dismissed would be meaningless and without purpose." Parr v. United States, 225 F.2d 329, 337 (5th Cir. 1955) (Cameron, dissenting).

Although not directly raised by the government's motion and memorandum, the constitutionality of rule 48(a) has been considered by this court. After consideration this court con-

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[8] Judge Brown apparently "fettered" what he previously considered "unfettered" discretion on the part of the United States Attorney to determine whether a prosecution is to be maintained or dismissed under rule 48(a). At the opening of his specially concurring opinion in *Cox* he states:

> I concur also that F.R.Crim.P. 48(a) vests the unfettered discretion in the District Attorney to determine whether a prosecution is to be maintained or dismissed. 342 F.2d at 182.

Judge Brown's footnote to his statement quoted in the text above raises further doubt as to whether, once a prosecution has begun the United States Attorney has unfettered discretion to dismiss the prosecution:

> The Court seems to be in virtual agreement that this rule is for the protection of the defendant alone. But the fact is we have not yet so held in a case directly presenting the question and in any event, viewed from the standpoint of the parties here, neither the District Attorney nor the Attorney General were required to assume that Rule 48(a) might not ultimately be construed as reserving considerable power to the District Judge himself in determining whether to enter a dismissal on the Government's motion. Actually, of course, the dissenters' concurrence on this is carefully hedged. 342 F.2d at 183-184 n. 6.

cludes that application of rule 48(a) does not infringe the doctrine of separation of powers and is therefore constitutional. The requirement of leave of court contained in the rule was placed there by the United States Supreme Court. The separation of powers issue was before the Advisory Committee on Rules, and had the constitutionality of the present rule been an obstacle to the Supreme Court they could have adopted the Committee's recommendation omitting the requirement of leave of court. Further, Congress gave its specific approval in promulgating the rules.[9]

Though the constitutionality of rule 48(a) was not before the court in *Cox, supra,* the majority nevertheless, felt that the rule is constitutional. In this regard the court stated:

> If it were not for the discretionary power given to the United States Attorney to prevent an indictment by withholding his signature, there might be doubt as to the constitutionality of the requirement of Rule 48 for leave of court for a dismissal of a pending prosecution. 342 F.2d at 172.

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[9] Judge Gerhard A. Gesell in overruling a government motion to dismiss an indictment charging perjury stated:

> Because Rule 48(a) of the Federal Rules of Criminal Procedure has been approved by Congress, review of the Court of the prosecutor's discretion is not a struggle for power between the Judicia and Executive branches, threatening the constitutional separation of powers. Instead, the Court is exercising appropriate review, prescribed as is commonly done by a co-equal branch of government—the Congress —over the faithful execution of the laws by the Executive . . . . The charge that he [the police lieutenant] testified falsely before the Grand Jury is not one that the Executive can abandon on the limited showing made. The Grand Jury is under the direction and control of the Court—the integrity of its processes must be preserved. No basis for dismissal has been shown. United States v. Cianciotti, Crim. No. 1795-72 (D.D.C., Oct. 27, 1972, rev'd without opinion, No. 72-2133, D.C.Cir. June 20, 1973). By local rule in the District of Columbia a Circuit Court's reversal without opinion is not precedent.

BLEED THROUGH

In support of its motion to dismiss the government cites Smith v. United States, 375 F.2d 243 (5th Cir. 1967). *Smith* is not applicable to the instant case. *Smith* involved an action under the Federal Tort Claims Act by a proprietor of a business claiming that the government failed to arrest and prosecute persons injuring plaintiff's business who objected to a verdict the plaintiff had rendered as a juror in a federal civil rights suit. The case dealt with a failure of the government attorney to arrest and prosecute. Rule 48(a) was not called into play in *Smith*. This court agrees that under the facts of *Smith* there is no liability on the part of the government in the exercise of its discretion not to seek an indictment.

The government also cites this court to Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973). This case also is a pre-indictment case and likewise is not in point. Inmates of a New York correctional facility sought to mandamus state and federal officials to investigate and prosecute persons who allegedly had violated certain federal and state criminal statutes in connection with treatment of inmates during and following a prison uprising. The second circuit properly held that mandamus would not lie because it was with the discretion of the United States Attorney whether to investigate and initiate the prosecution of the alleged offenders. Rule 48(a) had no applicability to the facts and was not discussed in the court's opinion.

Based on the foregoing, this court finds no difficulty in reaching the conclusion that rule 48(a) grants to this court the discretion to determine whether the government's motion to dismiss the indictment as to Jacobsen should be sustained. The

remaining issue to be resolved is whether the reasons advanced by the government are such that this court in the exercise of its sound discretion should grant the motion and dismiss the indictment as to Jacobsen.

The only reason advanced by the government in its motion to dismiss the indictment in this case against Jacobsen is that if it is not dismissed Jacobsen will not be bound to testify in the District of Columbia case or in any other case in which he is called as a witness, and that the best interest of justice will be served by disposing of the charges . . ." At the time this motion was presented in open court the United States Attorney was asked whether he wished to make any statement or present any evidence. He offered no evidence, and stated only that he would rely on the authorities in the government's brief and its motion to dismiss. Consequently, this court has no factual basis on which to grant a dismissal. The bare assertion in the government's motion that the best interest of justice" will be served is not sufficient to justify a dismissal. United States v. Becker, supra; United States v. Shanahan, supra. Moreover, this court is unable to perceive how the best interest of justice could be served by dismissing serious charges with a potential penalty of 35 years imprisonment and a $70,000 fine in exchange for a guilty plea in an unrelated case carrying a maximum penalty of 2 years and a $10,000 fine.[10] This is especially so in view

[10]In this connection the purported plea bargain reserves to the government the right to prosecute Jacobsen for "other serious crimes" and for perjury. This court is hard put to find a "more serious" federal crime than that charged against Jacobsen in this case of being instrumental in the embezzlement of $825,000 from a federally insured savings and loan association. Also, if the government attorney who entered into the plea bargain feels so strongly that perjury is a crime that should be excepted from immunization, it seems unusual, to say the least, that he would agree to a dismissal of the perjury charge (Count

BLEED THROUGH

of the fact that there has been *no* showing made that Jacobsen's testimony is vital or essential to the successful prosecution of the District of Columbia case or any other case.

It should also be noted that a joint investigation of the alleged violations in this case was made by the Texas Savings & Loan Department and the Federal Home Loan Bank Board. The investigatory material developed by these state and federal agencies was turned over to the federal officials with the understanding that the federal government would initiate and pursue appropriate prosecution. The State of Texas has informed this court that:

> Such relinquishment of such investigatory data would not have taken place had not the State of Texas not believed that the ends of justice would be fully pursued on the basis of the facts in *this* case. No further action has been taken to date by state officials, in the belief that appropriate federal action was being fully pursued. Motion of State of Texas to file Amicus Curiae Brief at 1-2.

In the opinion of the court these facts alone are sufficient grounds to conclude that the interest of justice would not be served by a dismissal of this case.

In its brief the government urges that even if the district court can in its discretion deny a government motion to dismiss that this court could not thereafter mandamus or compel the

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7) in this case against Jacobsen. Perjury is no less serious in Texas than it is in Washington. Further, perjury before a grand jury is a crime that cannot be treated lightly by a court in ruling on a government motion to dismiss. As stated in United States v. Shanahan, 168 F.Supp. 225, 226 (S.D.Ind.1959):

> Such an offense strikes at the very trunk nerve of our system of administering justice. It is not a minor offense, but one possessed with grave consequences. A motion for leave to dismiss a grand jury indictment charging such an offense cannot be taken lightly by the Court.

United States Attorney to prosecute the case. Brief of Government at 3, citing United States v. Cox, supra, 342 F.2d at 179, and United States v. Greater Blouse & Neckwear, supra. The dissent in *Cox*, however, stated:

> It may be that the court, in the interest of justice, may require a showing of good faith, and a statement of some rational basis for dismissal. In the unlikely event of bad faith or irrational action, not here present, it may be that the court could appoint counsel to prosecute the case. In brief, the court may have the same inherent power to administer justice to the government as it does the defendant. 342 F.2d at 179.[11]

The court in *Greater Blouse* recognized that a factor that must be considered is that it would be without power to compel prosecution of an indictment. 228 F.Supp. at 489-490. In considering this factor this court must assume that, absent compelling circumstances, if there is sufficient evidence to go forward with a prosecution appropriate action will be taken by the United States Attorney to protect and vindicate the public interest. Indeed, every indication is that the United States will go forward in this case upon the court's overruling the motion to dismiss. The government investigated the case against Jacobsen, sought and obtained an indictment against him, and until the present, has vigorously pursued this prosecution.[12]

As an alternative reason compelling dismissal of the indict-

[11]For an exhaustive discussion of the power of courts to appoint special prosecutors refer to comment, The Special Prosecutor in the Federal System. A Proposal, 11 Am.Crim.L.Rev. 578 (1973).

[12]The government has opposed most of the pre-trial motions of defendant Jacobsen through oral argument or briefs, or both. These motions include: (1) Motion to transfer; (2) motion to sever indictment; (3) motion to dismiss the indictment as multiplicitous; (4) motion to suppress; (5) motion to dismiss due to press leaks; and (6) motion to dismiss for lack of speedy trial.

BLEED THROUGH

ment the government argues that Jacobsen's plea in the District of Columbia case was pursuant to a plea bargaining agreement and that therefore its promise to Jacobsen to dismiss this case must be fulfilled. In support of this proposition the government cites Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Johnson v. Beto, 466 F.2d 478 (5th Cir. 1972); and Gallegos v. United States, 466 F.2d 740 (5th Cir. 1972). An examination of these cases quickly reveals that they are not applicable here. These do not stand for the proposition that a *court* must fulfill a bargain, as the government intimates. Rather, they involve situations where the government made a bargain with a defendant in a criminal case and subsequently the *government* reneged on its part of the bargain. In such instances certainly the prosecution must fulfill its promise. As stated by Judge Goldberg in a well reasoned opinion in *Gallegos*

> The cited cases [Santobello and Johnson] teach that if a plea bargain induced a guilty plea and the government's promise to take some course of action in return is not fulfilled, the person convicted is entitled to relief. 466 F.2d at 741.

Judge Goldberg further stated:

> Petitioner questions whether the *court* is not bound by a bargain struck between the government and the defendant in a criminal case. We do not find that this is the law; rather, the cases reveal that such a bargain is either specifically enforceable between the *parties to the agreement* or the plea is void. 466 F.2d at 741 (emphasis original).

Just as a prosecutor does not have the power to promise that a given sentence would be imposed, he could not promise that the court would dismiss the indictment under rule 48(a). A

conviction based on such a plea is open to collateral attack. *Johnson*, supra, 466 F.2d at 479 *citing* Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962).

The government in its bargain with Jacobsen made a promise to Jacobsen that it could not guarantee. It could have promised to move for a dismissal of this case under rule 48(a), but it could not guarantee a dismissal. This court was not a party to the bargain and is not bound by it.

In conclusion, in the exercise of the discretion vested in this court pursuant to rule 48(a), this court is of the opinion that the government's motion to dismiss the indictment against the defendant Jake Jacobsen should be overruled.

It is so ordered.

BLEED THROUGH

UNITED STATES of America

v.

Ray COWAN and Jake Jacobsen.

Crim. A. No. CR-6-74-3.

United States District Court,
N. D. Texas,
San Angelo Division.

Oct. 23, 1974.

ORDER APPOINTING SPECIAL PROSECUTORS

ROBERT M. HILL, District Judge.

The United States Attorney for the Northern District of Texas on August 29, 1974, presented a motion to dismiss all counts of a seven count indictment against the defendant Jake Jacobsen. On September 6, 1974, this court overruled the government's motion to dismiss. Thereafter, on September 12, 1974, the United States Attorney filed a notice of intention not to prosecute the case against Jacobsen. By order of this court filed September 13, 1974, the trial setting of this case on September 23, 1974, was vacated and the cause was continued subject to further orders of this court.

Federal Rule of Criminal Procedure 48(a) requires the consent of the trial court to effect the dismissal of an indictment on the motion of the Attorney General or United States Attorney. *McKlemurry v. United States*, 478 F.2d 1185, 1187

(5th Cir. 1973). For the reasons stated in the court's memorandum opinion and order of September 6, 1974, overruling the government's motion to dismiss, this court has withheld its consent to dismiss the indictment as to the defendant Jake Jacobsen. Where the government expresses an intention not to prosecute a criminal indictment which has been lawfully returned by a grand jury, signed by the foreman of the Grand Jury and by the United Sttaes Attorney, and which the court has refused to dismiss under rule 48(a), this court is of the opinion that special prosecutors should be appointed in order to protect and fulfill the public's interest in the vigorous prosecution of such an indictment.

This court's authority to appoint special prosecutors under these circumstances is derived from the implied statutory authority of rule 48(a) and from the inherent power of the judiciary to effect the proper and orderly administration of justice. The power of the court to appoint special prosecutors under rule 48(a) is necessary to the efficacy of the rule. Without the power to appoint special prosecutors under these peculiar circumstances, rule 48(a) would be an effete and meaningless rule of law.

The basic constitutional objection to the appointment of special prosecutors is that the power to prosecute is vested exclusively in the executive branch by Article II of the United States Constitution which empowers the President "to take care that the laws be faithfully executed." *See United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965); *Nader v. Bork*, 366 F.Supp. 104 (D.D.C.1973), reprinted in *Hearings on the Special Prose-*

BLEED THROUGH

cutor before the Committee on the Judiciary, United States Senate, 93rd Congress, 1st Session 1973, Part II, p. 480; *United States v. Solomon,* 216 F.Supp. 835 (S.D.N.Y. 1963). Article II, however, empowers Congress to vest the court with power to appoint inferior federal officers.[1] In approving rule 48(a), which gives the district courts discretion in the dismissal of an indictment by the Attorney General or United States Attorney, this court is of the opinion that Congress, albeit *sub silentio,* vested in the judiciary the power to appoint special prosecutors where necessary.[2]

Further, the appointment by a court of special prosecutors to prosecute a valid existing indictment is not incongruous with the separation of powers doctrine. The appointment of such an officer is intimately related to the primary constitutional duty of the Judiciary Branch to do justice in criminal prosecutions. In the recent case of *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), in discuss-

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[1] Article II in part provides:

> ". . . the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S.Const., art. II, § 2, cl. 2.

[2] By act of Congress the Supreme Court of the United States has the power to prescribe rules of criminal procedure. 18 U.S.C. §§ 3771, 3772. Such rules to take effect must be reported to Congress, and once so reported and effective all laws in conflict with such rules are of no force or effect. Section 3771 in pertinent part provides:

> The Supreme Court of the United States shall have the power to prescribe . . . rules of . . . procedure with respect to any or all proceedings prior to and including verdict . . . Such rules shall not take effect until they have been reported to Congress by the Chief Justice . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. 18 U.S.C. § 3771.

ing the separation of powers doctrine the Supreme Court stated:

> In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system but the separate powers were not intended to operate with absolute independence.
>
> > While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy reciprocity.

United States v. Nixon, 418 U.S. 683, 707, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039, 1063 (1974) *quoting Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring).

To read the Article II powers of the President as providing the Justice Department with absolute discretion to refuse to prosecute a criminal indictment on no more than the bare claim that "a bargain had been made" and that "it would be in the interest of justice" would upset the constitutional balance of powers and would "gravely impair the role of the courts under Art. III." *Cf. United States v. Nixon,* supra. Moreover, in appointing special prosecutors the court is not exercising a dual role, but rather it is fulfilling the need for prosecution by *conferring* a role.

In *United States v. Solomon,* 216 F.Supp. 835, 838-43 (S.D. N.Y.1963) the district court examined the separation of powers doctrine in holding that the appointment of a United States Attorney by a federal district court judge pursuant to statute was not unconstitutional. The court reasoned that by passage

BLEED THROUGH

of 28 U.S.C. § 546 which allows appointment of a temporary prosecuting officer Congress implemented Article 2, Section 2, Clause 2 of the United States Constitution. Though *Solomon* is distinguishable on its facts from the case sub judice, it is not distinguishable in principle. Rule 48(a) implemented Article 2, Section 2, Clause 2 and impliedly empowered the district courts to appoint special prosecuting officers where the Attorney General or the United States Attorney refuses to prosecute after the district court has exercised its discretion under the rule and refuses a dismissal of an indictment.[3]

In addition to the implied statutory authority under rule 48(a) to appoint special prosecutors, there is the inherent power of the judiciary to affect the proper and orderly administration of justice by appointing special prosecuting officials where necessary for the prevention of abuses of unfettered prosecutorial discretion. *See United States v. Cox*, 342 F.2d 167, 173-81 (5th Cir.), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965) (Rives, Gewin and Bell, JJ., concurring in part and dissenting in part).[4]

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[3] The North Dakota Supreme Court upheld a trial court's appointment of a special prosecutor on similar reasoning. State v. Lauder, 11 N.D. 136, 90 N.W. 564 (1902). The court recognized the common law right of the prosecutor to absolute control over criminal actions, but held that the common law rule had been abrogated by a state statute giving the court the power to finally decide whether an action should be dismissed. *Id.* at 568-569. Similarly, rule 48(a) abrogated the common law rule allowing the United States Attorney or Attorney General to file a nolle prosequi at any time before trial. Under the rule the federal prosecutor may move for a dismissal, but it is the province of the court to determine the ultimate question whether the case shall be prosecuted or dismissed. United States v. Jacobsen, 381 F.Supp. 214 (N.D.Tex. 1974) (Memorandum Opinion and Order) and authorities therein cited.

[4] Various state courts have embraced the inherent power concept of a court to appoint a special prosecutor in a criminal case. *See, e.g.*, Taylor v. State, 49 Fla. 69, 38 So. 380 (1905); Wilson v. County of

For the foregoing reasons, it is accordingly Ordered that Wayne O. Woodruff and Patrick E. Higginbotham be appointed special prosecutors, sharing equally all the powers and responsibilities enumerated in this order. It is further Ordered that Andrew Barr be appointed as first assistant to the special prosecutors.

The above named persons are qualified attorneys who are submitted to practice before the Supreme Court of Texas, the United States Court for the Northern District of Texas, the Court of Appeals for the Fifth Circuit and the United States Supreme Court.

It is further Ordered that the jurisdiction and role of the special prosecutors in this case should be limited solely to the prosecution of the defendant Jake Jacobsen on the seven count indictment returned by the federal grand jury on February 6, 1974, in the United States District Court for the Northern District of Texas, San Angelo Division. The special prosecutors shall have full authority to control the course of investigation and litigation related to the offenses charged in the indictment

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Marshall, 257 Ill.App. 220, 226 (1930); White v. Polk Cty., 17 Iowa 413 (1864); Territory v. Harding, 6 Mont. 323, 12 P. 750, 753 (1887); State v. Henderson, 123 Ohio St. 474, 175 N.E. 865, 867, (1931); Hisaw v. State, 13 Okl.Cr. 484, 165 P. 636, 640 (1917).

The doctrine of "inherent power" has been invoked by federal courts in certain instances. *E.g.*, Arkadelphia Milling Co. v. St. Louis SW Ry., 249 U.S. 134, 145-46, 39 S.Ct. 237, 63 L.Ed. 517 (1918) (to prevent misuse of court's process); FTC v. Hoboken White Lead & Color Works, 67 F.2d 551, 554 (2d Cir. 1934) (to punish for contempt); Refior v. Lansing Drop Forge Co., 124 F.2d 440, 444 (6th Cir.), *cert. denied*, 316 U.S. 671, 62 S.Ct. 1047, 86 L.Ed. 1746 (1942) (to dismiss a case for disobedience to a court order); United States v Paiva, 294 F.Supp. 742 (D.D.C.1969) (to dismiss an indictment where a U. S. attorney breached an agreement to drop a prosecution in return for the defendant's cooperation).

BLEED THROUGH

and to handle all aspects of the case to the same extent as a United States Attorney in any criminal prosecution.

It is so ordered.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Ray Cowan and Jake Jacobsen,
Defendants,

Wayne O. Woodruff et al., Special Prosecutors,
Appellees.

Nos. 74-3738, 74-3941.

United States Court of Appeals, Fifth Circuit.

Dec. 8, 1975.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas.

Appeal from the United Sttaes District Court for the Northern District of Texas.

Before BROWN, Chief Judge, MURRAH* and WISDOM, Circuit Judges.

MURRAH, Circuit Judge:

The first sentence of Rule 48(a) Fed.R.Crim.P. provides that "The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate." In

* Senior Circuit Judge of the Tenth Circuit, sitting by designation. This opinion was concurred in prior to Judge Murrah's death on October 30, 1975. See *Coca Cola Co. v. Federal Trade Comm.*, 5 Cir. 1973, 475 F.2d 299, 301.

BLEED THROUGH

our case the trial judge, the Honorable Robert M. Hill, denied the United States Attorney's motion under Rule 48(a) to dismiss pending criminal proceedings in the Northern District of Texas, and upon formal declination of the government to proceed, appointed private, special prosecutors to continue the prosecution of the case. The government took a timely appeal from the order appointing the special prosecutors under 28 U.S.C. § 1291 and, in the alternative, sought a writ of mandamus to require dismissal. It is conceded that the order appointing special prosecutors is final and appealable under § 1291. Inasmuch as the order appointing the special prosecutors is necessarily based upon the power of the court under Rule 48(a) to deny the motion to dismiss, the meaning and scope of that Rule are at issue, and we need not, therefore, consider the propriety of an extraordinary writ of mandamus.

Traditionally and at common law, public prosecutions were within the exclusive control of the district attorney with the absolute power to enter a nolle prosequi at any time before the jury is impanelled "except in cases where otherwise provided in some act of Congress." Confiscation Cases, 74 U.S. 457, 20 Wall. 92, 22 L.Ed. 320. See also *United States v. Brokaw*, 60 F.Supp. 100 (S.D.Ill.1945). "The Federal Rules of Criminal Procedure have the force and effect of law. Just as a statute . . . " *Dupoint v. United States*, 388 F.2d 39, 44 (5th Cir. 1967).[1] The precise question is the extent to which the phrase

[1] The rules were promulgated and adopted pursuant to Public Law 675 specifically empowering the Supreme Court "to prescribe . . . rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States . . . Such rules shall not take effect until they shall have been reported to Congress by the Attorney Gen-

"by leave of court" in Rule 48(a) limits or conditions the common law power of the Attorney General acting through his subordinates to dismiss an indictment without leave of court. The question is presented on these pertinent facts.

In February of 1974, a federal grand jury in the Northern District of Texas returned a seven-count indictment against Jake Jacobsen. Six of the counts charged Jacobsen and Roy Cowan with the fraudulent misapplication of funds of a federally insured savings and loan association in San Angelo, Texas. A seventh count charged Jacobsen alone with knowingly making a false statement under oath to the grand jury. The indictment was signed by the United States Attorney for the district. After rather extensive motion practice resulting in a pretrial order in April, the case was set for trial in July. On joint motion of the parties the case was continued until a day in September due to the unavailability of a government witness.

Meanwhile and in May of the same year, the Watergate Special Prosecution Force (see C.F.R. 0.37 and 0.38) and Jacobsen's Washington counsel negotiated an agreement whereunder Jacobsen agreed to plead guilty to a one-count charge to be filed in the District of Columbia alleging violation of 18 U.S.C. § 201(f) (bribing a public official) and make a full and truthful disclosure of all relevant information and documents within Jacobsen's knowledge and possession concerning matters then under investigation by the Watergate Special Prosecution

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eral at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect." U. S. Statutes at Large, 76th Congress, Chapert 445, Public Law 675 (June 29, 1940). The rules were promulgated and submitted to the Congress and became effective in March, 1946.

BLEED THROUGH

Force, and if required, be a witness on any charges arising out of any such investigation. The Special Prosecution Force agreed not to press any potential charges against Jacobsen in the District of Columbia arising out of the relevant investigation. It was also a part of the plea agreement that the government would dismiss the Texas indictment.

Apparently Jacobsen appeared before a grand jury in the District of Columbia in May giving testimony incriminating himself and others. In any event, in July the grand jury returned an indictment in the District of Columbia charging Jacobsen in one count with violation of 18 U.S.C. § 201(f) and as an unindicted co-conspirator in a conspiracy count against former Secretary of the Treasury John Connally. In August Jacobsen entered a guilty plea to the bribery count (18 U.S.C. § 201(f)). The plea was accepted and the sentence postponed. At the same time the plea agreement was filed with the clerk of the court.

In accordance with the plea agreement, the United States Attorney for the Northern District of Texas moved under Rule 48(a) to dismiss the indictment set for trial in September. A copy of the plea agreement was attached to the motion. The motion to dismiss recited that the Office of the Special Prosecutor and the Attorney General believed that Jacobsen's testimony was necessary to the investigation and prosecution of the indictment in the District of Columbia; that if it did not enter into the plea agreement, the testimony of Jacobsen in that case, or any other case in which his testimony is relevant, would be lost; that the motion to dismiss the Texas charges was made in good faith, in accordance with the plea agreement and not for purposes of harassment; and that the interest of

justice will be best served by disposing of the charges against Jacobsen in this manner. A memorandum of law supporting the Attorney General's absolute discretion to dismiss the indictment even without leave of court was filed with the motion. Jacobsen's Texas counsel joined in the United States Attorney's motion to dismiss. The motion was submitted in open court without further argument or testimony. On the same day and pursuant to another plea agreement, Judge Hill accepted a guilty plea by co-defendant Cowan to two counts of the Texas indictment and the United States Attorney agreed to move to dismiss the remaining counts after sentencing. Thus, all charges against Jacobsen and Cowan not disposed of by guilty pleas were made the subject of motions to dismiss by the government with consent of the defendants in accordance with the two plea agreements.

In an exhaustive opinion, the trial court asserted its discretionary power under Rule 48(a) to grant or deny the motion for leave to dismiss the Texas indictment against Jacobsen. Upon denial of the motion to dismiss, the United States Attorney filed its notice of intention not to prosecute. Whereupon, the court, asserting its inherent power to protect the public interest in these extraordinary circumstances, appointed private special prosecutors "with full authority to control the course of investigation and litigation related to the offenses charged in the indictment and to handle all aspects of the case to the same extent as the United States Attorney in any criminal prosecution."

The Attorney General stakes his claim to absolute power to dismiss the proceedings even without "leave of court" squarely upon the Doctrine of Separation of Powers as derived from

BLEED THROUGH

the provisions of the Constitution establishing three separate, but co-equal branches of government, each supreme in its own sphere; and more particularly upon Article II, Section 3 which provides in material part that the President "shall take Care that the Laws be faithfully executed" and upon 28 U.S.C. §§ 516, 519, empowering the Attorney General as surrogate of the President to conduct or supervise all litigation in which the government is a party. The court-appointed prosecutors counter that the Doctrine of Separation of Powers implied in the Constitution does not cast the three branches of our government into water-tight compartments; that room is left for some commingling of responsibilities in the orderly administration of governmental affairs; that by the promulgation of Rule 48(a) as part of the Rules of Criminal Procedure, Congress intended to vest in the courts a shared responsibility for the dismissal of prosecutions once lodged in the court; and that the power to grant leave to dismiss a criminal prosecution carries with it the correlative power to exercise a discretion to deny leave to dismiss and, if necessary, to effectuate such denial by the appointment of private prosecutors.

To sustain the asserted absolute power to dismiss the proceedings without "leave of court," the Attorney General relies heavily on *United States v. Cox,* 342 F.2d 167 (5th Cir. 1965) and its progeny. That case involved the power of the district court to require the United States Attorney, under penalty of contempt, to sign an indictment or true bill as presented by the grand jury in accordance with Rule 7(c) Fed.R.Crim.P., which provides that an indictment "shall be signed by the attorney for the government." A majority of the en banc court sustained the government's petition to prohibit the trial judge

from enforcing its contempt order and from asserting jurisdiction to require the Attorney General of the United States or the United States Attorney "to institute criminal prosecution or to take any steps in regard thereto."

After delineating the powers of the Judicial Department under Article III and of the Executive Department under Article II, Section 1 of the Constitution, Judge Jones speaking for the majority of the en banc court declared:

> "Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in thier control over criminal prosecutions. The provision of Rule 7, requiring the signing of the indictment by the attorney for the Government, is a recognition of the power of the Government counsel to permit or not to permit the bringing of an indictment. . . ." *United States v. Cox,* supra at 171.

This succinct and forthright statement has been quoted and applied, quite correctly we think, in a variety of situations under differing circumstances, all involving the Executive's power and authority to initiate a criminal prosecution or the power of the court to dismiss on its own motion a pending prosecution. See *Smith v. United States,* 375 F.2d 243, 247 (5th Cir. 1967);[2] *Newman v. United States,* 127 U.S.App.D.C.

[2] This case was a suit under the Federal Tort Claims Act for failure of the government to prosecute persons for the unlawful destruction of the complainant's property. The court held that the Tort Claims Act does not support a cause of action against the United States for omis-

BLEED THROUGH

263, 382 F.2d 479 (1967);[3] *Inmates of Attica v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973);[4] *United States v. Brown*, 481 F.2d 1035, 1043 (8th Cir. 1973);[5] *United States v. Olson*, 504 F.2d 1222 (9th Cir. 1974);[6] *Powell v. Katzenbach*, 123 U.S.App.D.C. 250, 359 F.2d 234, 235 (1965);[7] *Moses v.*

sion to initiate a prosecution, because the initiation of a prosecution is within the absolute discretion of the United States Attorney. Citing inter alia the Confiscation Cases, supra and *United States v. Cox*, supra.

3 In this case the petitioner claimed that the United States Attorney violated his constitutional rights by allowing a codefendant to plead guilty to a lesser included offense under the indictment while refusing to consent to the same plea for the appellant. Judge Burger speaking for his court affirmed the absolute discretion of the United States Attorney as an executive official "as to whether or not there shall be a prosecution in a particular case. . . . [Such exclusive authority is] an incident of the constitutional separation of powers." See page 481.

4 In this case the inmates of a prison sought to compel the United States Attorney to prosecute persons who had allegedly violated certain federal and state statutes in connection with the treatment of the inmates during and following a prison uprising. The court upheld prosecutorial discretion to initiate proceedings in the absence of a statutory deterrent. The court quoted from Cox with the further observation that "[T]he problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary. . . . [lest they become] 'superprosecutors'." See page 380.

5 In this case, the issue was the trial judge's power to dismiss an indictment on its own motion for the failure of the government to supply the court with initial information required to determine whether a guilty plea should be accepted. On appeal the court held that "A case [was] not to be summarily dismissed because the court disagree[d] with some policy of the District Attorney's office." Citing and quoting *United States v. Fleming*, supra, and *Newman v. United States*, supra. See page 1043.

6 In an opinion by Judge Ely, the Ninth Circuit held that the district court was powerless to require the United States Attorney to elect which valid count of a multi-count indictment the government would try, and upon failure to elect, to dismiss any of the valid counts in the indictment.

7 The court upheld the trial court's dismissal of a mandamus action to require the Attorney General to initiate a criminal prosecution against a national bank and its officers. The court held that the legislative history of the statute invoked by the plaintiff, 5 U.S.C. § 311a, pertaining to investigation of crimes by government officers, disclosed no congressional intent to alter the Executive's exclusive discretion to initiate a prosecution.

Kennedy, 219 F.Supp. 762 (D.D.C.1963).[8] See also *United States v. Fleming*, 215 A.2d 839 (D.C.App.1966). The exclusive authority and absolute discretion of the district attorney to decide whether to prosecute a case was apparently assumed in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), citing Confication Cases, supra, and *United States v. Cox*, supra. With the exception of *Cox*, none of the cited cases dealt with Rule 48(a).

Though the Rule was not at issue in *Cox*, it came under the scrutiny of the court in connection with the interpretation of Rule 7(c). The majority was apparently of the view that without the discretionary power given to the United States Attorney to prevent an indictment under 7(c) by withholding his signature, the constitutionality of Rule 48(a) would be doubtful.[9] The court accordingly justified the Rule with the observation that it was intended solely to authorize the court to protect a defendant from harassment by successive filings and dismissals. Chief Judge Brown specially concurring agreed that 48(a) "vests the unfettered discretion in the District Attorney to determine whether a prosecution is to be maintained or dismissed." He was careful, however, to acknowledge that the interpretation of 48(a) had not been directly presented and that there was no assurance the rule "might not ultimately be construed [to reserve] considerable power to the District Judge himself in determining whether to enter a dismissal on the Government's motion." See *Cox* at 183 n. 6. Judge Wisdom

[8] The trial court dismissed a mandamus action to require the Attorney General to arrest and prosecute certain state and local officials for denial of petitioner's constitutional rights.

[9] Though the court did not articulate its reasons for this observation, we surmise that it had in mind the constitutional restriction imposed by the Doctrine of Separation of Powers.

BLEED THROUGH

specially concurring was sure that "the district attorney has absolute control over criminal prosecutions [with power to] dismiss or refuse to prosecute . . . [t]he responsibility is wholly his." Citing *United States v. Woody,* 2 F.2d 262 (D.Mont. 1924) stating the common law rule before the advent of Rule 48(a). See *Cox,* supra at 191.

The holding in *Cox* is doubtless the law on its facts, and nothing we say here is intended to derogate from it. But ours is not a *Cox* case. *Cox* involved a challenge to the power of the court to direct the commencement of a prosecution, under Rule 7(c). We are concerned with the power of the court to supervise the termination of a prosecution in being, under Rule 48(a). While the dicta in all the opinions in the *Cox* case provide a formidable prefact to our inquiry, this dicta is inconclusive here because that court was not called upon to distinguish between the power to initiate and the power to terminate prosecutions.[10]

The absolute power and discretion of the Attorney General or his subordinates to institute prosecution is conceded, as it must also be conceded that no federal appellate court has come face to face with the asserted power of the district court under 48(a) to grant or withhold leave to dismiss a criminal prosecution once begun. The question is squarely presented here for

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[10]In his special concurrence in *United States v. Cox,* supra, at 183, Chief Judge Brown stressed the difference between the power to initiate and the power to terminate:

> "With it [a properly signed indictment] the whole prosecution has been started. And what was previously an unfettered discretionary right on the part of the executive not to initiate prosecution has now been set in motion and can be stopped only on the executive taking affirmative action for dismissal with all the uncertainties which F.R.Crim.P.48(a) generates."

the first time as a controversy between the Executive and Judicial Branches of government involving opposing asserted powers under the Rule. We now come face to face with the controversy, and it becomes " 'the province and duty of the judicial department to say what the law is.' " See Chief Justice Burger in *Nixon*, supra at 703, 94 S.Ct. at 3105 quoting Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 136, 1 Cranch. 137, 2 L.Ed. 60 (1803).

In situations like these history has its claims, and we think it is appropriate to review it. Before the adoption of 48(a), more than thirty states had, by statute[11] or judicial decision,[12] modified the common law to give courts a responsible role in the dismissal of a pending criminal proceeding by requiring an "order" or "leave" or "consent" of court. The state case law interpreting this change is sparse, but what there is of it consistently affirms the power and duty of the court to exercise discretion to grant or withhold leave to dismiss pending criminal prosecutions in "the public interest."[13] The American Law

[11]See statutes cited in ALI, Code of Criminal Procedure, Commentaries to § 295.

[12]*Guinther v. City of Milwaukee*, 217 Wis. 334, 258 N.W. 865 (1935); *People ex rel. Hoyne v. Newcomer*, 284 Ill. 315, 120 N.E. 244 (1918); *People ex rel. Kunstman v. Shinsaku Nagano*, 389 Ill. 231, 59 N.E.2d 96 (1945); *Denham v. Robinson*, 72 W.Va. 243, 77 S.E. 970 (1913); *State v. Ward*, 112 W.Va. 552, 165 S.E. 803 (1932); *State v. Charles*, 183 S.C. 188, 190 S.E. 466 and cases cited at 468-470 (1937). See also 103 A.L.R. 1249.

[13]*Guinther v. City of Milwaukee*, 217 Wis. 334, 258 N.W. 865, 867 (1935). See cases cited at note 12, supra. See also *Wallace v. State*, 145 Tex.Cr.R. 625, 179 S.W.2d 762 (1943); *Thor v. Ashe*, 138 Pa. Super. 222, 11 A.2d 173 (1940); *People v. Romero*, 13 Cal. App.3d 667, 57 P.2d 557 (Div. 1, 1936); *Ex parte Rusk*, 128 Tex.Cr.R. 135, 79 S.W.2d 865 (1935); *Jones v. Busby*, 37 Okl.Cr. 68, 256 P. 758 (1927); *Moore v. State*, 170 Ark. 697, 280 S.W. 657 (1926); *Lacey v. State*, 193 Ala. 677, 69 So. 244 (1915) (where the trial court's denial was held non-reviewable). Cf. *Shipp v. State*, 215 Miss. 541, 61 So.2d

BLEED THROUGH

Institute's Model Code of Criminal Procedure, drafted in the decade before the Rule, codified the state statutory law, clearly articulating a judicial discretion of significant scope:

> "The court either on the application of the prosecuting attorney or on its own motion may in its discretion for good cause order that a prosecution by indictment or information be dismissed. The order for dismissal shall be entered [of record] on the minutes with the reasons therefor.
>
> "No prosecution by indictment or information shall be dismissed, discontinued or abandoned except as provided in this chapter." § 295 Official Draft with Commentary (June 15, 1930).

Upon the adoption of the Federal Enabling Act, a distinguished committee commissioned by the Supreme Court submitted a number of drafts for the criticism of the bench and bar. See Orfield, Criminal Procedure under the Federal Rules § 48:17, pp. 336-337 (1967). The Advisory Committee submitted a preliminary draft to the Supreme Court including as a predecessor to Rule 48(a) the following: "The Attorney General or the United States Attorney may file a dismissal of the indictment or information with a statement of the reasons therefor and the prosecution shall thereupon terminate." Id. at p. 338. Professor Orfield, a member of the original Advisory Committee and the author of a treatise on the criminal rules, tells us that in the Supreme Court's response to the Committee's draft, "[t]he court pointed out that the proposed Rule [now 48(a)] gave the Attorney General unqualified authority to nolle prosse a case without consent of the court," and inquired "Is

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329 (1952) (where the court's power to exercise discretion was not questioned, but its abuse of discretion was found when the evidence supporting insanity as a ground for nolle prosequi was overwhelming).

this now the law, and should it be the law, any more than that the Government can confess error on appeal in a criminal case without consent of the court? Cit[ing] *Young v. United States*, 315 U.S. 257-259 [62 S.Ct. 510, 86 L.Ed. 832] (1942)." Id.

In the Young case the government confessed error on appeal but the Supreme Court took the case to examine independently the confessed error. In the opinion the court stated, "The public interest that a result be reached which promotes well-ordered society is foremost in every criminal proceeding. The interest is entrusted to our consideration and protection as well as that of the enforcing officers." 315 U.S. at 259, 62 S.Ct. at 511.

In a resubmitted draft, the Committee made no changes in this Rule despite the Reporter's suggestion that the Committee reconsider it "in the light of the suggestion of the Supreme Court and its statement in *Young v. United States*," and § 295 of the American Law Institute Code of Criminal Procedure and the law of thirty states, requiring the consent of the court. Orfield, Criminal Procedure Under the Federal Rules, § 48:17, p. 339. The Supreme Court deleted the phrase "with a statement of the reasons therefor," and, in lieu thereof, inserted the phrase "by leave of court." Id. at 48:19, p. 343. As thus amended, 48(a) was submitted to Congress and adopted. It seems manifest that the Supreme Court intended to make a significant change in the common law rule by vesting in the courts the power and the duty to exercise a discretion for the protection of the public interest. The early case law interpreting the Rule supports this theory.

The first case of record is *United States v. Doe*, 101 F.Supp. 609 (D.Conn.1951). Like our case, Doe involved a government

BLEED THROUGH

motion to dismiss an entire prosecution against the defendant. Judge Hincks was of the considered view that the term "by leave of court" in the new Rule contemplates that the court shall exercise a "sound discretion in the premises."[14]

The court considered and sustained a Rule 48(a) motion to dismiss criminal proceedings in *United States v. Greater Blouse, Skirt & Neckwear Con. Ass'n*, 228 F.Supp. 483 (S.D.N.Y. 1963). While indulging in the good faith of the prosecution, and giving great weight to its recommendations, Judge Weinfeld was nevertheless of the view that the recommendations were not conclusive upon the court, "otherwise there would be no purpose to Rule 48(a), which requires leave of Court . . ."; that the rule contemplated public exposure of the reasons for the abandonment of an indictment, information or complaint in order to prevent "abuse" of the uncontrolled power of dismissal previously enjoyed by the prosecutors; that to gain the court's favorable discretion, the prosecution must convince the court that the reasons for the proposed dismissal are substantial. Id. at 486. The motion was granted, because the government

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[14]Judge Hincks, later of the Second Circuit, referred to the remarks of another member of the Advisory Committee, Mr. G. Aaron Youngquist, before the institute on Federal Rules of Criminal Procedure at the New York University Law School in a session held in February, 1946, before the effective date of the rules. Mr. Youngquist commented:

> "The rule as submitted to the Supreme Court by the Committee . . . gave the Attorney General or the United States Attorney a right to dismiss without leave of court, but required that there be filed a statement of the reasons for the dismissal. The Supreme Court, however, has revised the rule and adopted it as it now reads, that no statement of reasons is required but the leave of court must first be obtained."

Federal Rules of Criminal Procedure with Notes of the Committee and Proceedings, under the imprimatur of the New York University Law School at 170-171 (1946). See also Moore's Federal Practice 48.02[1]; Wright, Federal Practice and Procedure § 812.

was without sufficient evidence to warrant prosecution and the dismissal was not for the purpose of harassing the defendant. Judge Weinfeld was of the further view that "to overcome the force of [the prosecution's] recommendation, it must clearly and convincingly appear that the public interest requires its refusal." Id. See also *United States v. Bettinger*, 54 F.R.D. 40 (D.Mass.1971); *United States v. Becker*, 221 F.Supp. 950 (W.D.Mo.1962); *United States v. Shanahan*, 168 F.Supp. 225 (S.D.Ind.1958) (where Judge Steckler had no doubt of the trial court's discretion to grant or deny leave to dismiss under 48(a)); *Nesbitt v. United States*, 249 F.2d 17 (6th Cir. 1957) (where the court upheld the dismissal of a prosecution upon motion of the government without the consent of the defendant).

Judge Weinfeld anticipated our case when he postulated what would eventuate should the motion to dismiss be denied. He reasoned that the Attorney General would still have discretion to decline to move the case for trial; in which event, the court would be without power to issue mandamus or other order to compel prosecution since such direction would violate the traditional Separation of Powers Doctrine. The result is that although the court is authorized to deny the motion to dismiss in the public interest, it is nevertheless constitutionally powerless to compel the government to proceed.

This brings us pointedly to an accommodation of the intended scope of the Rule and the sweep of the Constitution. Chief Justice Burger (then Judge of the District of Columbia Circuit) put our problem in proper perspective when he observed:

> "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or

BLEED THROUGH

> what precise charge shall be made, or whether to dismiss a proceeding once brought." *Newman v. United States*, supra at 480.

And in *United States v. Nixon*, supra at 704, 94 S.Ct. 3090, 3105, the Chief Justice again emphasized the delicacy of the court's role in this area, quoting Justice Brennan in *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed. 663 (1962):

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Surely, we should approach our task with the humility which characterizes the proper exercise of all power.

It seems to us that the history of the Rule belies the notion that its only scope and purpose is the protection of the defendant. The Supreme Court's deliberate insertion of the phrase "by leave of court," the phrase itself denoting judicial choice, must be taken in the context of the Court's contemporaneous *Young* decision and the state modifications of the common law as codified by the American Law Institute. Viewed in this light, we think it manifestly clear that the Supreme Court intended to clothe the federal courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice. It is against this background that we consider the overpowering effect of the Doctrine of Separation of Powers.

In the resolution of this question, we think *United States v.*

Nixon, supra, both pertinent and authoritative. In that case the Chief Executive asserted the unqualified privilege of an immunity from judicial process under all circumstances as a derivative of the Doctrine of Separation of Powers. Chief Justice Burger responded:

> "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.
>
> > " 'While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.' *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 35 [72 S.Ct. 63, 70, 96 L.Ed. 1153] (1952) (Jackson, Jr., concurring)." *United States v. Nixon*, supra at 707, 94 S.Ct. at 3107.

The Chief Justice, speaking for a unanimous court, went on to conclude that the legitimate needs of the judicial process may very well outweigh Executive privilege; and that it is necessary to resolve these competing interests in a manner that preserves the essential function of the Executive Branch by according high respect to its claim of privilege. Ultimately, the Court sustained the power to subpoena Executive material pertaining to the fair administration of criminal justice without affecting the national security.

BLEED THROUGH

That authoritative reasoning should be our guide here. We think the rule should and can be construed to preserve the essential judicial function of protecting the public interest in the evenhanded administration of criminal justice without encroaching on the primary duty of the Executive to take care that the laws are faithfully executed. The resulting balance of power is precisely what the Framers intended. As Judge Wisdom put it, quoting Montesquieu, " 'To prevent the abuse of power, it is necessary that by the very disposition of things, power should be a check to power' . . . [thus] the framers wove a web of checks and balances designed to prevent abuse of power" and "were too sophisticated to believe that the three branches of government were absolutely separate, air-tight departments." *United States v. Cox,* supra at 190. From this, it seems altogether proper to say that the phrase "by leave of court" in Rule 48(a) was intended to modify and condition the absolute power of the Executive, consistently with the Framer's concept of Separation of Powers, by erecting a check on the abuse of Executive prerogatives. But this is not to say that the Rule was intended to confer on the Judiciary the power and authority to usurp or interfere with the good faith exercise of the Executive power to take care that the laws are faithfully executed. The rule was not promulgated to shift absolute power from the Executive to the Judicial Branch. Rather, it was intended as a power to check power. The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated. The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest

public interest. In this way, the essential function of each branch is synchronized to achieve a balance that serves both practical and constitutional values.

Judge Hill was undoubtedly clothed with a discretion to determine whether the dismissal of these charges was clearly contrary to the public interest. But it is a judicial discretion subject to appellate review. And since that discretion is constitutionally sensitive, we feel bound to a closer scrutiny than in the ordinary case where such practical considerations as finality of decision, judicial economy, and trial judge's closeness to the evidentiary process dictate greater appellate court deference.[15] If upon appraisal of all the revelant factors, the appellate court has a definite and firm conviction that the trial court committed a clear error of judgment in the conclusion it reached, the judgment must be reversed. See *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954) (Magruder, C. J.), quoted in *Noonan v. Cunard Steamship Co.*, 375 F.2d (2d Cir. 1967). Judging this case by these standards in the light of the Rule's history and constitutional context, we are convinced that the trial court exceeded the authority committed to it under the Rule.

Judge Hill was "unable to perceive how the best interest of justice could be served by dismissing serious charges with a potential penalty of thirty-five years imprisonment and a $70,000 fine in exchange for a guilty plea in an unrelated case carrying a maximum penalty of two years and a $10,000 fine." He also referred to the fact that "the investigatory material developed by [Texas] state and federal agencies was

[15]See Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L.Rev. 635 (1971).

BLEED THROUGH

turned over to the federal officials with the understanding that the federal government would initiate and pursue appropriate prosecution"; that the government's "bare assertion" of reasons for dismissal was unaccompanied by factual evidence. In these circumstances, he concluded, "the interest of justice would not be served by a dismissal of this case." The brief of the court-appointed prosecutors seems to impugn the good faith of the government by suggesting that the motion to continue the trial, filed jointly by the prosecution and both defendants in June 1974, was calculated to facilitate the surreptitious performance of the plea agreement negotiated one month earlier between Jacobsen and the Watergate Special Prosecution Force, and thus dispense with the trial of the Texas case.

We think this appraisal of the whole matter misapprehends the relative roles of the Executive and the Judiciary under 48(a). The considerations which prompted Judge Hill to overrule the motion to dismiss are, in our judgment, legally insufficient to overcome the presumption of the government's good faith and establish its betrayal of the public interest. We do not think the plea negotiations between the two prosecutorial arms of the government and counsel for both defendants were improper, even though not disclosed to the sentencing judges until consummation. It is not suggested that the facts recited in the joint motion for continuance were untrue, or that they were inadequate grounds for a continuance. In this situation, we can hardly say that the motion was a sham or a deception. It was not incumbent upon the government to inform the sentencing judges of the plea negotiations until after they had been consummated. The result of these negotiations was finally placed before both sentencing courts in the form of plea

agreements, which themselves have a legitimate and desirable function in the effective administration of criminal justice. See ABA Standards, Pleas of Guilty §§ 3.1, 3.3.[16] Nor was it clearly contrary to the public interest for the government to accept in these plea agreements a reduction in the maximum possible sentence of Cowan and Jacobsen, when, as stated in the government's motion, it served to further an investigation by an especially created and wholly autonomous arm of the Executive. We cannot agree with Judge Hill's view that this motion lacked specificity of evidentiary proof. The representations in the motion and the supporting memorandum were not merely conclusory; they specified the investigation being pursued in the District of Columbia and the necessity of obtaining Jacobsen's cooperation under the plea agreement calling for dismissal of the Texas charges. We are convinced that this is legally sufficient to justify leave of court to dismiss the Texas charges against Jacobsen in consideration of his guilty plea in the District of Columbia.

In sum, it was within the province of the two prosecutorial

[16]In pertinent part, the Standards read as follows:

§ 3.1 Propriety of plea discussions and plea agreements.
(a) In cases in which it appears that the interest of the public in the effective administration of criminal justice (as stated in section 1.8) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. . . .

§ 3.3 Responsibilities of the trial judge.
(a) The trial judge shoud not participate in the plea discussions.
(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. . . ."

BLEED THROUGH

arms of the government to weigh the relative importance of two separate prosecutions in two separate districts and dispose of them as practical considerations seemed to dictate. Nothing in this record overcomes the presumption that they did so in good faith for substantial reasons sufficiently articulated in the motion to dismiss. As to the interest of the State of Texas in these charges, we can perceive no reason why the dismissal would bar or prejudice a state prosecution on substantially the same Texas charges. In the first place, Jacobsen was never put in jeopardy on the Texas charges. Moreover, a prosecution by one sovereign is no bar to a prosecution by another sovereign arising out of the same facts. *Bartkus v. Illinois,* 359 U.S. 121, 136, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *Abbate v. United States,* 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959).

Having concluded that the trial court exceeded the bounds of its discretion under Rule 48(a) in denying the government's motion to dismiss, we have no cause to consider the propriety of its order effectuating that denial by appointing special prosecutors. The case is reversed and remanded with directions to sustain the motion to dismiss.